IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-87

CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida corporation, HALLMARK DEVELOPMENT COMPANY, INC., a foreign corporation licensed to do business in the State of Florida, KENNETH A. MARRIOTT, VERNON M. MILLER, and GEORGE C. WAGNER,
Petitioners,
vs.
THE CITY OF DUNEDIN, FLORIDA, a municipal corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA, SECOND DISTRICT

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, City of Dunedin, Florida, a municipal corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the District Court of Appeal of the State of Florida, Second District.

JURISDICTION

Petitioners have invoked jurisdiction under 28 U.S.C. §1257 (3) in that petitioners' rights, privileges and immunities

under the United States Constitution were claimed in the proceedings below. However, careful scrutiny will reveal several impediments to review by the Court. As will appear more fully under "Reasons For Denying the Writ" *infra*, there is doubt that any federal questions were preserved; that review was timely sought; that petitioners have standing; or that there remains a present controversy between the parties.

QUESTIONS PRESENTED

1. Whether respondent, City of Dunedin, having legal authority to impose impact fees when such fees were collected from petitioners, may retroactively impose on itself administrative conditions necessary to the lawful retention and expenditure of such fees.

2. Whether petitioners have been denied equal protection of the laws in being required to pay impact fees for expansion of municipal utilities, where during this litigation portions of such expansion have been constructed with proceeds of revenue bonds to be repaid from user charges exacted from all present customers.

STATEMENT OF THE CASE

All references herein are to petitioners' appendix.

Prior to this litigation, respondent financed its water and sewer systems through the traditional devices of connection charges and monthly user fees. In 1972, faced with explosive growth and overloaded utilities, respondent adopted the challenged ordinances imposing additional assessments on new customers to defray the capital cost of new facilities. Such assessments are popularly known as "impact fees."

Petitioners instituted suit alleging that respondent lacked authority to impose such fees; that the fees were unlawful taxes or special assessments; and that the ordinances were facially unconstitutional under the due process and equal protection

clauses of the fourteenth amendment (A-1-12). The trial court initially held that respondent was not authorized by state law to charge such fees (A-14); the court expressly avoided the constitutional questions (A-16). On appeal, the district court of appeal reversed, finding as a matter of state law that such fees were within the authority of the City, and that "the ordinances are constitutional and do not unlawfully discriminate against newcomers as asserted by appellees " (A-23). The district court nevertheless certified the case as a question of great public interest. On certiorari, the Supreme Court of Florida held that such fees were within the definition of "just and equitable" rates required by state law; that the particular ordinances in question were defective for failure to specify necessary restrictions on the use of such fees; and that the defects could be cured retroactively (A-24 *et seq.*). The court expressed doubt as to petitioners' standing to raise any equal protection claims on behalf of newcomers to the community, but noted that the ordinances easily met the rational basis test (A-27 n. 2). *No review was sought here at that time.*

On remand, respondent proved that it had retroactively supplied the missing provisions for administration of the challenged collections, and the amended ordinances were upheld as a matter of law. No appeal was taken from that conclusion. However, the trial court ruled that retroactive amendment of ordinances was constitutionally impermissible under *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922). The court further found that petitioners were being charged disproportionately because they were also being required to participate in the retirement of a 1974 bond issue which financed the most pressing improvements while litigation continued.

Respondent appealed again, asserting that the earlier decision of the supreme court had become the law of the case. The district court of appeal agreed, and *also* distinguished *Forbes Pioneer* on its facts, pointing out that as a matter of state law respondent had at all relevant times possessed the authority to adopt the challenged ordinances, so that the necessary adminis-

trative restrictions could be added retroactively. The district court of appeal further held that the challenged receipts could lawfully be used for further expansion of facilities or for retirement of the 1974 bonds, so that petitioners had not been disproportionately assessed.

Petitioners again sought certiorari from the supreme court but that court found that it lacked jurisdiction, thus finding no conflict with its prior decision on the merits of petitioners' arguments. Thereupon petitioners filed with this Court a petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

1. THE COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION FOR CERTIORARI.

A. THE FEDERAL QUESTION HAS NOT BEEN PRESERVED.

It is noted that the petition deviates from the requirements of Rule 23 (1) (f) in that it fails to specify the manner in which the federal questions asserted here were raised and passed upon by the court below.

The constitutional provisions asserted in the petition were not urged by any party in the court below, in any assignment of error, brief or oral argument. The decision below makes no reference to the claimed constitutional rights, privileges or immunities of petitioners. The most that can be said is that the asserted provisions were the basis of this Court's opinion in *Forbes Pioneer, supra,* and that the court below obliquely considered the Constitution in distinguishing *Forbes Pioneer* on its facts. However, the decision below is supportable entirely on state grounds; namely, that the previous decision of the Supreme Court of Florida is the law of the case.

B. THE PETITION SEEKS UNTIMELY REVIEW OF THE 1976 DECISION OF THE SUPREME COURT OF FLORIDA.

Petitioners have alleged that they are entitled to invoke the jurisdiction of this Court to review the judgment of the district court of appeal, rendered in a second appeal in 1978. However, even though federal questions were raised in the 1974 complaint (A-10), this Court does not have jurisdiction to consider either question presented for review because such questions have not been brought before this Court on a timely basis.

As to the issue of the retroactive correction of the Dunedin ordinance and the question of refunds, this petition is untimely, because the Supreme Court of Florida's decision of February 25, 1976, established the law of the case to be that: "Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected. We pretermit any discussion of refunds for that reason." (A-32). This ruling was specifically acknowledged by the district court of appeal: "The Supreme Court's decision in *Contractors, supra,* is the law of the case." (A-40) The right of the City of Dunedin to provide for the control of these funds and thereby lawfully to retain and use them was established in Justice (now Circuit Judge) Hatchett's 1976 decision.

The subsequent litigation arose from the trial judge's misapplication of the law of the case in his supplemental opinion. If the law of the case was to be reviewed by this Court on certiorari, the time for filing such petition commenced on April 2, 1976. This petition is therefore untimely.

A review of the progress of this litigation through the courts of the State of Florida makes it obvious that the constitutional issues relative to the second question presented were finally determined in the first sequence of appellate proceedings which concluded with the Supreme Court of Florida's 1976 ruling (A-24). The original complaint filed by petitioners in the Circuit Court for Pinellas County, Florida, attacked the re-

spondent's ordinance on three grounds: (1) that the City of Dunedin lacked the legislative authority to enact such an ordinance; (2) that the ordinance was invalid as a special assessment; and (3) that the ordinance was unconstitutional on its face and in its application. It is only the last of these allegations that is material. The trial court determined that it was not necessary to rule on the constitutional issues raised because it had adjudicated the ordinance to be invalid on other grounds (A-16). The district court in its 1975 opinion specifically ruled that the ordinances were constitutional, noting the trial judge's failure to do so (A-23). The Supreme Court of Florida upheld the concept of the impact fee and held that the ordinance "easily meets the rational basis test" necessary to satisfy the constitutional challenge on the basis of denial of "equal protection of the laws to new residents of Dunedin" (A-27, n. 2) but quashed the district court's opinion and remanded the case for further proceedings after finding that the ordinance was defective because of its failure to include in its terms certain restrictions that the supreme court deemed necessary to insure the proper expenditure and administration of the funds collected. Rehearing was denied on April 2, 1976, and it was at this point that the petitioners' time to file a petition for certiorari to this court on the second question began. At no subsequent time in these proceedings, particularly in the supplemental judgment of the trial court or in the second district court opinion were any constitutional issues raised. The supplemental judgment of the trial court (A-33) was limited to a discussion of the propriety of retroactive correction of the Dunedin ordinance to allow the city to retain the funds collected under the ordinance found to be defective by the supreme court. The trial judge ruled that the city could not so correct the ordinance and retain the funds previously collected, and ordered a refund. No constitutional issues were expressly raised in the opinion. The district court of appeal reversed the trial judge's ruling and in its opinion identified the issues before it as follows:

> "There is no question that a municipality may now impose "impact fees." The only question we have before us now is whether or not those appellees who paid impact fees under protest are entitled to a refund."

The petition for rehearing to the district court of appeal was denied on June 6, 1978 (A-50) and a petition for writ of certiorari to the supreme court was denied on April 24, 1979 (A-51). Petitioners can prevail only if the time for filing commenced then .

The constitutional issues raised by the petitioners in their initial pleadings were entirely disposed of in the 1976 judgment of the Supreme Court of Florida. The issues in the pleadings subsequent to this judgment were concerned exclusively with the question of retroactive correction of the ordinance and whether or not refunds of fees paid by the petitioners would be forthcoming from the City of Dunedin. The petitioners' attempt to "piggyback" the second question presented, on the basis that the ruling of the trial judge regarding the propriety of the curative legislation established some constitutional right of due process, cannot endow this Court with the jurisdictional prerequisites that are essential for consideration of the question. For this reason, the petition should be denied.

C. PETITIONERS LACK STANDING TO ASSERT THE CONSTITUTIONAL RIGHTS CLAIMED.

Petitioners are an incorporated association of building contractors and several of its individual members. It was alleged in 1973 that the individual petitioners owned properties within the respondent city which would be unlawfully subjected to an "impact fee" or capital contribution charge to defray the cost of expanding water and sewer systems to serve new customers (A-2). The general authority of the respondent to impose such a fee was upheld by the supreme court in 1976 (A-24). On remand, petitioners argued that many of the capital improvements planned in 1973 had been financed during the appeal process by a 1974 revenue bond issue, serviced by monthly charges to be exacted over many years from all customers of the city, so that petitioners would be doubly charged, and therefore denied equal protection, if they are required to pay an "impact fee."

At the hearing on remand, it was established that all of the individual petitioners had disposed of the properties which they owned at the time of filing. Accordingly, none of the individual petitioners falls within the category of persons who would be "doubly charged." Nor does the Association aver that it represents any group of permanent customers who would be subject both to an "impact fee" and to an ongoing burden of retiring sewer and water revenue bonds.

The existence of the alleged "double charges" in fact or in law has been addressed by the state courts and will be addressed in Point 3 below. It is sufficient to note here that for purposes of establishing the jurisdiction of this Court, there is serious doubt as to the existence of a case or controversy involving *these* parties.

There is no dispute that petitioners have suffered an injury in fact and that the injury is caused by enactment of an ordinance imposing a new economic burden on the construction of facilities requiring water and sewer service. The question is whether there is a relationship between the injury alleged and the rights asserted. (*Flast v. Cohen*, 392 U.S. 83 (1968); *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975). Since it has been determined as a matter of state law that "impact fees" may be charged to new utility customers, the question urged is not whether such fees are void but whether such fees may deny equal protection to customers who are also subject to the continuing burden of retiring bonds issued to pay for some of the same capital improvements. The right asserted is not a right of the *builder* or other initial payor of an impact fee; it is the right of a *customer* to be free from the burden of paying again for improvements already financed by a previous owner of the property. When a builder pays the required impact fee, it is speculative to assume he or she will also pay continuing monthly service charges imposed in part to retire a bond issue. On this record, there is neither averment nor proof that petitioners are subject to the burden of servicing such a bond issue or otherwise

paying twice. The record is also devoid of any evidence of special circumstances which would entitle petitioners to assert the rights of other parties not before the Court. (*Barrows v. Jackson*, 364 U.S. 249 (1953); *Warth v. Seldin*, 422 U.S. 490 (1975).

D. THIS CAUSE IS MOOT.

On remand from the Supreme Court of Florida, respondent undertook curative amendments to its ordinance in accordance with that court's suggestions. The trial court thereupon held that the curative ordinances were legally sufficient, and petitioners took no appeal from that conclusion. (A-33). Petitioners are thus relegated to the position of arguing the unfairness of charges imposed against properties no longer owned by them, under ordinances which have been superseded. No complaint has been pursued regarding the new ordinances. Further, under the former ordinances, impact fees were attributable to particular properties, based upon proposed connection of the properties to water and sewer systems. The right of connection remains with the property, and is not retained by a former owner upon resale. The existence of such a connection is reflected in the value paid by a purchaser, so that any refunds would necessarily be made to present owners of connected properties, rather than any of the petitioners. Accordingly, no issue remains to be adjudicated between these parties.

2. PETITIONERS HAVE NOT BEEN DENIED EQUAL PROTECTION OF THE LAWS IN BEING REQUIRED TO PAY IMPACT FEES FOR EXPANSION OF MUNICIPAL UTILITIES WHERE, DURING THIS LITIGATION, PORTIONS OF SUCH EXPANSION HAVE BEEN CONSTRUCTED WITH PROCEEDS OF REVENUE BONDS TO BE REPAID FROM USER CHARGES EXACTED FROM ALL PRESENT CUSTOMERS.

Petitioners argue that Article I, Section 10 of the Constitution of the United States has, in some manner, been affronted by the decision of the district court of appeal (ruling in accord-

ance with the law of the case stated by the Supreme Court of Florida), that Dunedin could retroactively correct its water and sewer ordinance and retain funds previously collected as "impact fees". Petitioners do not specify that this reference is to the constitutional prohibition against the passage of an ex post facto law. Respondent presumes that this is the intended reference since none of the other elements of that section of the Constitution would appear to be relevant to the litigation. This claim may be dealt with expeditiously. The ban against ex post facto legislation pertains exclusively to criminal cases according to every decision emanating from this Court in the twentieth century. The scope of prohibited ex post facto legislation has been narrowed so that it now encompasses only those laws that have been traditionally perceived as criminal in nature. For this reason, petitioner's labored attempts to find some frailty inherent in the Dunedin ordinance stemming from some right, privilege or immunity arising from Article I, Section 10, must be summarily dismissed.

Again, in the remainder of the question presented, the petitioners do not explain with clarity how the fourteenth amendment to the Constitution is offended by the City of Dunedin's ordinance approved by the district court of appeal. Presumably, petitioners contend that they have been deprived of property without due process of law. In order to suffer an unconstitutional deprivation of a property right, that right must be firmly fixed or "vested" in the person claiming to have suffered such a loss. The petitioners assert that the decision of the trial judge vested a right to reimbursement in them; however, there is a long history of federal cases standing for the proposition that there is no vested right in a court decree while that decree is subject to review. (*See, e.g., Asselta et al v. 149 Madison Avenue Corporation*, 79 F.Supp. 413, 415 (S.D.N.Y. 1948) Petitioners attempt to legitimize the vesting of some right to refunds by means of the argument that because the trial judge determined that the right to a refund was vested, therefore the elimination of such a "vested right" by operation of the curative ordinance was a denial of due process. The trial judge had made

a finding of law, not of fact, in this conclusion and was overruled by the district court. Whether or not a right is vested is a question of law, not of a trial judge's factual findings.

The cases permitting retroactive correction of legislation are legion. These cases are usually founded on public policy principles in favor of curative statutes as being necessary to preserve the adequate functioning of government or in order to leave "some play in the joints of the machine." *Forbes Pioneer, supra*. That case supports the general principle of curative statutes, and its misinterpretation by the trial judge is adequately discussed by the district court in its second opinion (A-40) Hochman in *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 705 (1960) suggests that equitable arguments in favor of retention of a benefit gained because of defective legislation, even if "vested", contain an inherent frailty:

> "Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall, since, had the legislature's or administrator's actions had the effect it was intended to and could have had, no such right would have arisen. Thus the interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect." (at 705)

The constitutionality of curative legislation on facts similar to the instant case is a settled area of the law which has experienced little change in this century. The petitioners present nothing novel in either facts or argument that would encourage the disturbance of the status quo. Petitioners' situation is markedly similar to that of the plaintiffs in *Asselta, supra*, in which claims for overtime compensation under the Fair Labor Standards Act were determined to be defeasible by the subsequent passage of the Portal-to-Portal Act which exempted from penalty employers who, in good faith reliance on certain administrative regulations, had failed to pay overtime wages. The court held that the curative act was not a deprivation of the employees' due process

right under the fifth amendment. The court also ruled that the judgment of the district court had not vested any rights in the employees because the ruling was still subject to review. Here, presented in its best light to the petitioners' cause, there is a defective ordinance, curative legislation and a trial judge's opinion in favor of the claimant. None of these factors is sufficient to justify the retention of a windfall by the petitioners, and it is clearly the law that under the fact situation before the court, no constitutionally protected rights have come into existence and that Dunedin could correct its oversight in the draft of the ordinance challenged. The petitioners have failed to identify any constitutional issue or raise any important public policy issue to justify this Court's consideration of the case beyond its present stage.

3. PETITIONERS HAVE NOT BEEN DENIED EQUAL PROTECTION OF THE LAWS IN BEING REQUIRED TO PAY IMPACT FEES FOR EXPANSION OF MUNICIPAL UTILITIES, WHERE DURING THIS LITIGATION PORTIONS OF SUCH EXPANSION HAVE BEEN CONSTRUCTED WITH PROCEEDS OF REVENUE BONDS TO BE REPAID FROM USE CHARGES EXACTED FROM ALL PRESENT CUSTOMERS.

Petitioners complain because respondent has cautiously refused to spend impact fees while litigation continues. Yet pressing needs for new facilities, intended to be funded by impact fees, became necessary and were constructed with proceeds of a revenue bond issue in 1974. All present customers of the systems, old and new, pay monthly rates which amortize the bonds. Petitioners therefore complain that they are paying twice for the same improvements.

There are several answers. The first is that petitioners have neither alleged nor proven that they participate in the retirement of bonds. The evidence is that all petitioners have disposed of the properties they owned at the beginning of the suit.

Assuming *arguendo* that petitioners have standing, the

second answer is that according to the opinion of the court below, impact fees may be used to retire the 1974 bonds. The bond issue may be viewed simply as a temporary loan to finance emergency needs during this litigation. The impact fees are now held in a trust fund, and the 1976 decision of the Florida Supreme Court established the uses which may be made of those fees. Manifestly the fees will be spent for improvements which benefit petitioners, for *no other use would be lawful.*

The third response to petitioners' complaint of double assessment is that the original intent of the challenged ordinance was to place the principal burden of capital expansion on the new customers who made such expansion necessary. To the extent that all customers, old and new, have participated in retiring the 1974 bonds, petitioners have been relieved of the primary burden of the required expansion. Far from being doubly assessed, petitioners have thus shifted the obligation of expansion costs to all of the users of the utility system.

Petitioners complain that they have been assessed for improvements which they will never use. But the trial court found that the city systems were at capacity before petitioners connected (A-13). While *some* of the improvements necessary to serve petitioners may have been constructed from 1974 bond proceeds, the fact remains that *all* post-1972 expansion benefits petitioners because otherwise they could not have been served at all.

The evidence established that a portion of the 1974 bond proceeds was spent for upgrading the overall quality of utility service to all customers. Petitioners cannot complain that, having been once assessed for a portion of the cost of capital facilities to serve them, they are thereafter free from any burden of sharing in the maintenance and upgrading of the entire system. *Carson v. Brockton Sewerage Commission,* 182 U.S. 298 (1901).

In *Roberts v. Irrigation District,* 289 U.S. 71 (1932), it

appeared that the Richland Irrigation District had initially fixed special assessments upon the lands in the district, calculated on benefits conferred by the proposed improvements. Later, some of the assessments became delinquent and the district proposed to reassess the remaining properties for the delinquency. Roberts protested, arguing that the district was powerless to assess his lands for an amount greater than the benefit conferred. This Court found no abuse of governmental power, and upheld the assessment. Similarly, in the case at bar, petitioners complain that respondent is powerless to charge more, through user charges or otherwise, than the amount fixed in the impact fee ordinance. This contention ignores the fact that the impact fee was never intended as full and final payment of petitioners' entire share of the cost of new facilities. At the time of trial, the fee was $700 per dwelling unit, but the cost of the facilities was $988 per dwelling unit (A-23). Petitioners also ignore the availability of impact fees to retire the 1974 bonds, a fact which makes the "double assessment" argument purely speculative.

The arguments of petitioners have not heretofore been clearly framed in proper constitutional form, but they have been exhaustively considered by the courts of Florida in four separate appeals. The district court of appeal, after remand, has found that as a matter of state law, respondent "has followed the directions of the Supreme Court explicitly." (A-41).

It should be noted that petitioners again asked the district court of appeal to certify its decision as a question of great public interest and the district court declined (A-48). It is respectfully urged that the district court was quite correct. The only questions that petitioners raise are concerned with the particular facts of this case alone, with the particular city ordinances involved, and are of interest only to the parties involved. Additionally, every level of the state courts has acknowleged the essential fairness and social desirability of the purpose of the Dunedin ordinances and no novel question of law or unusual fact situation has been raised. This case is unworthy of further judicial attention.

CONCLUSION

For any one or more of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of August, 1979, three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the District Court of Appeals of the State of Florida, Second District, have been furnished by mail to JOHN T. ALLEN, JR., 4508 Central Avenue, St. Petersburg, FL 33711, Attorney for Petitioner.

Attorney